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No. 77-925

In the Supreme Court of the United States

OCTOBER TERM, 1977

ROY P. WINDHAM, ET AL., PETITIONERS

v.

AMERICAN BRANDS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE SECRETARY OF AGRICULTURE IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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This case presents a single question: whether the district court abused its discretion in ruling, on the basis of facts developed during extensive pre-trial proceedings, that the case should not proceed as a class action. The court of appeals, sitting *en banc*, concluded that the district court had not abused its discretion, and there is no reason for further review by this Court.

1. Petitioners, six South Carolina tobacco growers, filed this action in the United States District Court for the District of South Carolina, charging that the respondent tobacco companies had conspired among themselves, with the acquiescence of the Secretary of Agriculture, to fix prices in the market for flue-cured tobacco in South Carolina. Petitioners sought certification of a plaintiff

class of all tobacco growers in South Carolina, and the district court conducted extensive proceedings to determine whether that class should be certified.

At the conclusion of those proceedings, the district court declined to certify the class (68 F.R.D. 641; Pet. App. 40a-76a). It held that the common questions of law and fact in the case do not predominate over the questions affecting only individual members of the class; that a class action would be unmanageable; and that a class action would not be superior to other available methods for adjudicating the controversy. Fed. R. Civ. P. 23(b)(3). Because it appeared that the allegedly unlawful conduct affected different class members in very different ways, the court concluded that class action treatment of the case would raise insuperable problems in determining whether, in what ways, and to what degree particular class members were injured by the respondents' conduct. The class action, the court concluded, "would, in effect, degenerate into innumerable individual lawsuits" (Pet. App. 69a-70a).

Similarly, because of the complexity of assessing the proof of injury necessary to establish liability, and because petitioners had demanded a trial by jury, the court concluded that if permitted to proceed as a class action, the suit would consume a minimum of ten years of trial time (Pet. App. 66a). Finally, the court noted that the combined sum of the damages claimed by the six named plaintiffs was substantial enough that it was likely that the suit could be maintained as an individual action, and that denial of certification would not have the effect of terminating the action altogether.

A panel of the court of appeals held that the case should have been certified as a class action, at least for adjudication of the issue of liability, in light of what it

considered "almost a rebuttable presumption that such a class action should be allowed where there is a plausible claim of violation of the Sherman Act" (Pet. App. 35a-36a). The *en banc* court disagreed and held that the district court had not abused its discretion in ruling that the case should not proceed as a class action (565 F. 2d 59; Pet. App. 1a-25a).[1]

2. As the *en banc* court suggested, if denial of class certification in an antitrust case is ever appropriate, it was appropriate here.[2] The district court found from pre-trial proceedings, in which the court took an active part (Pet. App. 41a), that the case would be enormously difficult and time-consuming to try as a class action and that even on the issue of liability the court would likely founder amidst a mass of individualized claims of differently situated class members. Besides pointing to the difficulty of determining the existence of injury and damages to various class plaintiffs, the court of appeals observed that the complaint had alleged a wide range of illegal conduct with differing effects on different plaintiffs (*id.* at 12a-13a). Accordingly, the court concluded that this case is peculiarily ill-suited to class-wide adjudication, even on the issue of liability (*id.* at 13a-14a).

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[1]The United States has only a limited interest in the issue presented by this case, because the Secretary of Agriculture is not subject to antitrust liability for his official actions and because, even if damages are ultimately awarded in this private treble damage suit, they cannot be recovered against the United States. See *United Mine Workers* v. *Pennington*, 381 U.S. 657, 671; *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 136; *United States* v. *Rock Royal Co-op.*, 307 U.S. 533. The Secretary's motion to be dismissed as a party was denied by the district court (Pet. App. 43a-46a), but that issue is not before the Court because only the class action issues were certified for interlocutory appeal (Pet. App. 75a).

[2]Petitioners' contention to the contrary, the provisions of Rule 23 apply with the same force in antitrust cases as in any others; no class

Notwithstanding the vehemence of petitioners' argument, there is nothing in the least extraordinary about the decision of the *en banc* court of appeals. Because of the fact-bound nature of the inquiry, the class certification decision is properly committed to the discretion of the district court.[3] Indeed, the case on which petitioners chiefly rely as creating a conflict in the circuits emphasizes that the question whether a claim can appropriately be litigated on a class-wide basis necessarily turns on the facts of each case. *Bogosian* v. *Gulf Oil Corp.*, 561 F. 2d 434, 455 (C.A. 3).

For the reasons given in the district court's opinion and in the opinion of the *en banc* court of appeals, the district court did not abuse its discretion in denying the class certification motion in this case. Further review by this Court is unwarranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

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of cases enjoys special treatment under Rule 23. See *East Texas Motor Freight System* v. *Rodriguez*, 431 U.S. 395, 405.

[3]Every court of appeals follows this rule. See, *e.g.*, *Cross* v. *National Trust Life Insurance Co.*, 553 F. 2d 1026 (C.A. 6); *Peterson* v. *Oklahoma City Housing Authority*, 545 F. 2d 1270 (C.A. 10); *Guerine* v. *J & W Investment, Inc.*, 544 F. 2d 863 (C.A. 5); *Castro* v. *Beecher*, 459 F. 2d 725 (C.A. 1); *City of New York* v. *International Pipe & Ceramics Corp.*, 410 F. 2d 295 (C.A. 2).

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